

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054**

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In the Matter of

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Joint Petition of the National Exchange
Carrier Association, Inc. (NECA), National
Rural Telecom Association (NRTA),
National Telephone Cooperative
Association (NTCA), Organization
for the Promotion and Advancement
of Small Telecommunications Companies
(OPASTCO), and United States
Telephone Association (USTA)
for Expedited Interim
Waiver of Section 52.33(a) of the
Commission's Rules

CC Docket No. 95-116

CCB/CPD No. 99-9

REPLY

The National Exchange Carrier Association, Inc. (NECA), National Rural Telecom Association (NRTA), National Telephone Cooperative Association (NTCA), Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and United States Telephone Association (USTA), (collectively referred to as "Telephone Associations"), hereby reply to comments filed in response to the *Public Notice*¹ regarding the Telephone Associations' Petition for Waiver of Section 52.33(a) of the Commission's Rules.²

¹ Pleading Cycle Established for Comments on Petition for Expedited Interim Waiver of Section 52.33(a) of the Commission's Number Portability Rules, CC Docket No. 95-116, CCB/CPD 99-9, *Public Notice*, DA 99-581 (rel. Mar. 24, 1999)(*Public Notice*).

² Joint Petition of the National Exchange Carrier Association, Rural Telecom Association, National Telephone Cooperative Association, Organization for Promotion and Advancement of Small Telecommunications Companies and United States Telephone Association for Expedited Interim Waiver of Section 52.3 (a) of the Commission's Rules, filed March 19, 1999 (*Joint Petition*).

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In the *Joint Petition*, the Telephone Associations explained that there is no apparent mechanism for recovery of local number portability (LNP) related costs that are incurred by non-LNP-providing incumbent local exchange carriers (ILECs).³ The Telephone Associations accordingly requested an interim waiver of section 52.33(a) of the Commission's rules to allow these ILECs to directly assign their on-going carrier-specific LNP related costs, which the Commission has determined to be wholly interstate, to the interstate jurisdiction for recovery via traffic sensitive (TS) interstate access charges.⁴ Grant of the waiver will allow non-LNP-providing ILECs to recover LNP-related costs until such time as the Commission develops a permanent LNP cost-recovery mechanism for these ILECs.

Comments supporting the Telephone Associations' *Joint Petition* were filed by TDS Telecommunications Corporation, Moultrie Independent Telephone Company, Telephone Association of New England, Oklahoma Rural Telephone Coalition & Texas Statewide Cooperative, and Clear Creek Mutual Telephone Company.

AT&T opposes the Associations' petition, arguing that the Commission's *LNP Cost Recovery Order*⁵ expressly prohibits the recovery of LNP costs through access charges.⁶ AT&T agrees, however, that non-LNP-capable ILECs will in fact incur LNP-related costs, and also agrees that the Commission's Order prevents non-LNP-capable

³ See *Joint Petition* at 2 – 3.

⁴ See *Joint Petition* at 2.

⁵ See Telephone Number Portability, CC Docket No. 95-116, *Third Report and Order*, 13 FCC Rcd 11701 (1998) (*LNP Cost Recovery Order*).

⁶ See AT&T Opposition (AT&T) at 2 and 6 (Apr. 8, 1999) and Sprint Comments (Sprint) at 2 (Apr. 8, 1999) However, the Telecommunications Act does not forbid such treatment. See 47 U.S.C. § 251(e)(2).

carriers from recovering these costs via end-user charges.⁷ Thus, AT&T's Opposition confirms the basic premise of the Associations' Petition -- namely, that the Commission's Order appears to affirmatively prevent non-LNP-capable carriers from recovering their wholly interstate LNP-related costs either through access charges or end-user charges.

Unfortunately, AT&T appears to take the position that non-LNP carriers should simply be required to forego recovery of these costs. AT&T makes no attempt, however to address the constitutional infirmities of this position.⁸ MCI and Sprint, on the other hand, appear to recognize that a cost recovery mechanism is required. Their oppositions suggest, however, that the Commission could resolve the problem by clarifying that end-users of non-LNP-providing ILECs, whose local calls terminate in a neighboring ILEC's LNP-capable switch, could be considered as being served by the neighboring ILEC's switch.⁹ This interpretation, according to MCI and Sprint, would allow the originating ILEC to impose end-user charges to recover any query charges assessed.

AT&T states, however, that the Commission "expressly declined to permit ILECs to recover their LNP costs through end-user surcharges except in cases in which they

⁷ AT&T at 2.

⁸ As NECA pointed out in its Petition for Reconsideration, a Commission order that requires carriers to contribute to support of number portability and to pay query charges while at the same time specifically forbidding carriers from recovering those costs in their rates would plainly implicate the "takings" clause of the 5th Amendment of the Constitution. See NECA Expedited Petition for Reconsideration at 4 (July 29, 1998), citing, *Federal Power Commission v. Hope Natural Gas*, 320 U.S. 591, 603 (1944).

⁹ Sprint at 2, MCI Worldcom Opposition at 4 (Apr. 8, 1999)(MCI). MCI suggests, however, that "if the Commission does find that it is necessary to provide some type of interim cost recovery mechanism for small ILECs whose only LNP cost is their NPAC assessment, the Commission could permit recovery through interstate access charges -- but only on an interim basis and subject to two conditions. First, the Commission should make clear that the waiver applies only to those ILECs that are not purchasing query service and have not deployed their own LNP capability. . . . Second, the rate development for the NPAC-recovery access charge must be shown separately from the rate development for other traffic sensitive rates."

were actually offering portability in a given switch.”¹⁰ AT&T explains that this prohibition was put in place to assure that end-user charges are applied only in areas where end-users receive the benefits of number portability. Interpreting section 52.33(a) in the manner suggested by MCI and Sprint would appear contrary to this policy.

These diverse opinions serve to illustrate the Telephone Associations’ point that it is “not clear how ILECs that do not provide service from an LNP-capable switch or who serve end-users outside the largest 100 MSAs will recover their ongoing LNP costs.”¹¹ The Telephone Associations’ interim solution avoids confiscation issues until such time as the Commission can address long term cost recovery issues for non-LNP-capable carriers, perhaps in the context of petitions for reconsideration of the *LNP Cost Recovery Order*.

AT&T argues that non-LNP-providing ILECs are in the same position as other non-ILEC telecommunications carriers.¹² For example, AT&T equates the non-LNP-providing ILEC situation to that of interexchange carriers (IXCs) and CMRS providers who choose not to recover these costs.¹³ However, section 52.33(b) of the Commission’s rules clearly state that “[a]ll telecommunications carriers other than incumbent local exchange carriers may recover their number portability costs in any manner consistent with applicable state and federal laws and regulations.” (*emphasis added*) Unlike IXCs and

¹⁰ AT&T at 6.

¹¹ *Joint Petition* at 3 - 4.

¹² *See* AT&T at 2 - 3.

¹³ *See* AT&T at 3. (“In fact, the costs that are the subject of the Petition. . . will also be borne by IXCs and CMRS providers, carriers that operate in highly competitive markets and thus will face strong pressures to refrain from passing those costs on”)

CMRS providers, non-LNP-providing ILECs cannot predicate cost recovery decisions based upon available market choices; there simply is no cost recovery option.

Sprint further objects to the *Joint Petition* “because the bulk of the costs which they propose to recover through interstate traffic sensitive access charges are for *local* calls.”¹⁴ However, as the Commission clearly stated in its *LNP Cost Recovery Order*, LNP costs are wholly interstate in nature,¹⁵ hence recoverable via interstate charges.

AT&T also asserts that the Telephone Associations’ request is not consistent with the Telecommunications Act’s requirement that LNP costs be recovered in a “competitively-neutral” manner.¹⁶ Contrary to AT&T’s view, the Telephone Associations’ request for an interim waiver does not conflict with the competitive-neutrality standard. The Telephone Associations are requesting this waiver only for those areas where no *bona fide* request has been received. Grant of the requested waiver certainly would not put IXCs at a competitive disadvantage *vis-à-vis* each other because costs will be distributed to all IXCs based on access usage. When a competitive local exchange carrier seeks to enter the area, it presumably will issue a *bona fide* request for LNP capability. At that time, the waiver will no longer be needed because the ILEC will be able to make use of the recovery mechanism specified in section 52.33(a) of the Commission’s rules. Thus, AT&T’s neutrality concern simply does not apply to situations that are the subject of the *Joint Petition*.

¹⁴ See Sprint at 2.

¹⁵ See *LNP Cost Recover Order* at ¶ 29.

¹⁶ AT&T at 5. See 47 U.S.C. § 251(e).

Good cause has been shown for grant of the requested waiver.¹⁷ A number of commenting parties explain the need for an immediate recovery mechanism for non-LNP-providing ILECs.¹⁸ For example, Moultrie Independent Telephone Company (Moultrie), a company servicing 806 access lines, illustrates the significant LNP costs it will incur if there is no waiver of the Commission rules.¹⁹ Clear Creek Mutual Telephone Company, a company servicing 3,777 access lines located within fifty-two square miles, states that it will encounter LNP-related costs of about \$35,000 per year, mostly from query charges associated with its customers calling 27 nearby communities that collectively have nearly one million access lines.²⁰ Such costs will amount to a small percentage of interstate access charge revenue requirements, but are significant enough to be of concern to small ILECs if recovery is not permitted in some manner.

¹⁷ Contrary to AT&T's assertion, the *Joint Petition* does not request "evisceration" of the Commission's LNP cost recover rules. Rather, waiver of the rules is sought on an interim basis, to address a particular situation that doesn't seem to have been considered in the Commission's *LNP Cost Recovery Order*. The Commission has traditionally been willing to grant interim relief where it appears that "special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest." *Billed Party Preference for InterLATA 0+ Calls, Order*, 13 FCC Rcd 12576 (1998) at ¶ 4. *See also* *Investigation of Bell Atlantic's New Expanded Interconnection Offerings*, 11 FCC Rcd 19790 (1996) (Commission grants interim waiver while it considers Bell Atlantic's Motion to Vacate Prescription).

¹⁸ *See, for example* TDS Telecommunications Corporation (TDS) explains that non-LNP-providing ILECs are already incurring obligations to contribute to the regional centers' costs and query service charges; however they currently have no mechanism to recover such costs. *See* TDS Comments at 2 (Apr. 8, 1999). *See also* Telephone Association of New England Comments at 1 – 2 (Apr. 8, 1999) (a recovery mechanism is necessary, and the Commission should act in an expeditious manner.)

¹⁹ Moultrie Independent Telephone Company Comments at 3 (Apr. 8, 1999).

²⁰ Clear Creek Mutual Telephone Company Comments at 1 – 2 (Apr. 8, 1999).

Conclusion

Good cause having been shown, the Commission should grant the requested waiver without delay. As comments submitted by TDS, Moultrie and Clear Creek make clear, non-LNP-capable ILECs are beginning to incur LNP costs now. As even the opposing comments make clear, the Commission's cost recovery rules, as established in the *LNP Cost Recovery Order*, appear to affirmatively prevent these carriers from recovering their LNP costs through end user charges or other means. Accordingly, Commission waiver of the rules, to permit these carriers *temporarily* to directly assign their on-going LNP costs to interstate access charges, is justified.

Respectfully submitted,

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